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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. RALPH HIBBLER, Defendant and Appellant.	C086979 (Super. Ct. No. 17FE016325)

Defendant appeals a judgment entered after a jury found him guilty of being a felon in possession of a firearm, and the trial court found true two enhancements that defendant had suffered a prior strike conviction for a serious felony and served two prior prison terms. Defendant contends: (1) insufficient evidence supports his conviction for firearm possession; and (2) the trial court abused its discretion in admitting the 911 call of a nontestifying witness in violation of state rules of evidence and his Sixth Amendment right of confrontation.

We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Four excerpts of 911 calls arising from the disturbance were admitted into evidence and played for the jury but were not transcribed by the court reporter. At 5:43 a.m., an unidentified female called 911 to report her neighbors fighting and yelling. She believed they were moving out and had heard breaking glass. The caller reported her address before the call abruptly ended. At 5:52 a.m., K. H. made the first of three 911 calls to authorities. K. H. reported that she had had her neighbor call earlier and that she was in the midst of a fight with her boyfriend (defendant), who was "trying to take everything[,] . . . breaking shit[,] . . . [and] trying to fight [her] son." She gave the same address as the previous caller, adding that she was in apartment C. Defendant was threatening her, and she was not sure whether he had a gun. K. H. called again at 5:53 a.m. She was crying and warned that defendant was very angry. He had heard her on the phone. The operator told K. H. it was okay to put the phone down, and the open phone line recorded K. H. arguing with defendant and telling him to keep his hands off her. The couple had been told they had to vacate the apartment and were arguing over the ownership of their possessions.

K. H.'s final call came in at 6:04 a.m. It began by recording K. H. arguing with defendant, who she mentioned had threatened her, her life, and her kids. She told him to get out of her face and stay away from her son. When K. H. was able to speak with the operator, she reported, "He's, he's does have a gun. He does have one. He - I see the handle. He's got it in his bag. (Unintelligible) upstairs, but he does have one." The operator told K. H. to leave the apartment, but she refused stating that she could not leave her son. The operator also complained that K. H.'s crying was making it difficult to understand her. Nonetheless, K. H. relayed that defendant had gone upstairs, and she was okay when he was upstairs, but was not okay when he comes down. The call ended once it appeared that the officers arrived.

Deputy Kyle Ikeuchi testified that he contacted defendant, who was on the stairwell, and secured him with handcuffs. Defendant was the only person inside the apartment. Ikeuchi proceeded upstairs, where he searched some bags and located a loaded handgun inside a black dress sock inside a bag containing adult men's clothing. Authorities had been told by K. H. that the bag belonged to defendant. A record's check revealed the gun had been stolen. Defendant denied that it was his handgun. Deputy Ikeuchi then showed the gun to him, and defendant responded, "So you searched my shit?"

Deputy Devin Card testified that he took K. H.'s statement on the morning in question. K. H. reported that she saw something in defendant's pocket, felt that it was hard, and was adamant that it was a gun. K. H. thought defendant had probably put the gun in one of his bags upstairs. K. H.'s teenaged son was sitting on the curb near the moving truck and refused to speak with Card.

The defense also played a portion of a video of defendant in the back of the police car wherein he denied the gun was his and asked that it be fingerprinted.

The parties stipulated that defendant had been convicted of a felony and was prohibited from owning or possessing a firearm. They also stipulated that the 911 calls came from the same phone number.

The jury found defendant guilty of being a felon in possession of a firearm. Defendant waived his right to a jury trial on the priors, and the trial court found true two enhancements that defendant had a prior strike conviction for a serious felony and served two prior prison terms. The court declined to strike the prison priors and sentenced defendant to an aggregate prison term of six years. The court imposed the minimum restitution fine of $300 and imposed a matching suspended parole revocation fine of $300. It imposed all other mandatory fines and struck all discretionary fines.

DISCUSSION

I

Defendant's Possession Of The Firearm

Defendant argues insufficient evidence supports that he possessed the firearm in contravention of his right to due process. We disagree.

As explained in *Story*, " 'In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] . . . The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] " 'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.' " ' " ' " (*People v. Story* (2009) 45 Cal.4th 1282, 1296.)

To establish possession of a firearm by a felon, the People must prove "conviction of a felony and ownership or knowing possession, custody, or control of a firearm." (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029, disapproved on other grounds in *People v. Frierson* (2017) 4 Cal.5th 225, 240, fn. 8; see also § 29800, subd. (a)(1).)

"A defendant possesses a weapon when it is under his dominion and control. [Citation.] A defendant has actual possession when the weapon is in his immediate possession or control. He has constructive possession when the weapon, while not in his actual possession, is nonetheless under his dominion and control, either directly or

through others." (*People v. Peña* (1999) 74 Cal.App.4th 1078, 1083-1084.) "Possession may be imputed when the [weapon] is found in a place which is immediately accessible to the joint dominion and control of the accused and another." (*People v. Miranda* (2011) 192 Cal.App.4th 398, 410.) "Implicitly, the crime is committed the instant the felon in any way has a firearm within his control." (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1410, italics omitted.)

Constructive possession can be established by circumstantial evidence and reasonable inferences drawn from the defendant's conduct. (*People v. Williams* (1971) 5 Cal.3d 211, 215.) The inference of dominion and control is easily made when the contraband is discovered in a place over which the defendant has general dominion and control. (*Ibid*. [single pill on floor in front of seat where defendant was sitting]; *People v. Miranda, supra,* 192 Cal.App.4th at pp. 410-411 [circumstantial evidence shotgun jointly possessed by car occupants].) This includes his residence. (See, e.g., *People v. Bagley* (1955) 133 Cal.App.2d 481, 484-485.)

Here, the reasonable inferences from the evidence presented support that defendant constructively possessed the gun. K. H. told the 911 operator that defendant had a gun. Authorities then located the gun in defendant's apartment in a male dress sock within a duffle bag identified to the officers by K. H. as belonging to defendant.[1] Thus, substantial evidence supports the jury's implied finding that defendant constructively possessed the gun.

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[1] No objection was raised to the officer's testimony concerning K. H.'s statement on this issue.

II

The 911 Call

Defendant argues the trial court erred in admitting K. H.'s 911 call because: (1) it did not qualify as a spontaneous statement; and (2) its admission nonetheless violated the confrontation clause. We disagree.

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) "Except as provided by law, hearsay evidence is inadmissible." (Evid. Code, § 1200, subd. (b).) Nonetheless, Evidence Code section 1240 recognizes a "spontaneous statement" may be admissible under certain delineated circumstances. It provides, "[e]vidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

A proponent of admission of a spontaneous statement must establish the following requirements: " ' "(1) [T]here must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it." [Citations.]' [Citation.] A statement meeting these requirements is 'considered trustworthy, and admissible at trial despite its hearsay character, because "in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief." ' " (*People v. Merriman* (2014) 60 Cal.4th 1, 64, quoting *People v. Clark* (2011) 52 Cal.4th 856, 925.)

In determining whether the proposed statement was made "while the declarant was still under the stress and excitement of the startling event and before there was 'time to contrive and mispresent,' " the court may consider a number of factors, none of which is dispositive. (*People v. Merriman*, *supra*, 60 Cal.4th at pp. 64-65, quoting *People v. Poggi* (1988) 45 Cal.3d 306, 318.) "Such factors include the passage of time between the startling event and the statement, whether the declarant blurted out the statement or made it in response to questioning, the declarant's emotional state and physical condition at the time of making the statement, and whether the content of the statement suggested an opportunity for reflection and fabrication." (*Merriman*, at p. 64.)

"Whether an out-of-court statement meets the statutory requirements for admission as a spontaneous statement is generally a question of fact for the trial court, the determination of which involves an exercise of the court's discretion." (*People v. Merriman*, *supra*, 60 Cal.4th at p. 65.) We will uphold the trial court's determination of facts when they are supported by substantial evidence and review for abuse of discretion " 'the ultimate decision whether to admit the evidence.' " (*People v. Phillip*s (2000) 22 Cal.4th 226, 236.)

Here, the trial court found K. H.'s 911 calls were admissible because they fell within the spontaneous statement exception of Evidence Code section 1240. The court found, during the calls, K. H. was describing an ongoing disagreement with defendant. She was frightened and wanted to leave but could not because of her son and valuables. Defendant threatened her and her son, and at some point in the confrontation, had a gun. Much of the calls contemporaneously recorded the argument between K. H. and defendant, and thus, were both contemporaneous and spontaneous.

We discern no abuse of discretion. First, the trial court was within its discretion in determining that this domestic disturbance was a continuing and startling event. K. H. and defendant were engaged in an ongoing, heated argument wherein defendant threatened K. H. and her son and was also breaking things. K. H. was upset, both

screaming and crying on the calls. K. H. told the operator in one of the initial calls that she was not sure if defendant was armed, but in a later call K. H. reported that defendant did have a gun and that she had seen it. Second, the court did not abuse its discretion in determining that K. H.'s statements were made before there was time to contrive or misrepresent. On the contrary, the calls were describing an ongoing altercation with defendant, and as found by the trial court, were largely contemporaneous, in addition to being spontaneous. Finally, the trial court did not abuse its discretion in determining that K. H.'s statements related to the startling occurrence. K. H. called authorities for help with a heated domestic disturbance and relayed information relevant to that disturbance. In addition to these direct statements, the open line also recorded much of the ongoing altercation between K. H. and defendant. Therefore, the calls related to the startling occurrence. Accordingly, the trial court did not abuse its discretion in admitting the 911 calls under Evidence Code section 1240. (*People v. Merriman*, *supra*, 60 Cal.4th at pp. 64-65.)

The confrontation clauses of both the federal and state Constitutions guarantee a criminal defendant the right to confront the prosecution's witnesses. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) However, that right is not absolute. *Crawford v. Washington* (2004) 541 U.S. 36, 59 [158 L.Ed.2d. 177, 197] held that "testimonial out-of-court statements offered against a criminal defendant are rendered inadmissible by the confrontation clause unless the witness is unavailable at trial and the defendant has a prior opportunity for cross-examination." (*People v. Geier* (2007) 41 Cal.4th 555, 597.) Nonetheless, where a statement offered against a defendant is *nontestimonial* in nature, it does not run afoul of the confrontation clause. (*Davis v. Washington* (2006) 547 U.S. 813, 821-822 [165 L.Ed.2d 224, 236, 237].)

"Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or

some other purpose unrelated to preserving facts for later use at trial." (*People v. Sanchez* (2016) 63 Cal.4th 665, 689; see also *Davis v. Washington*, *supra*, 547 U.S. at p. 822 [165 L.Ed.2d at p. 237].) As recognized in *Davis*, statements made to a 911 operator "under circumstances objectively indicating that the primary purpose of the interrogation [wa]s to enable police assistance to meet an ongoing emergency" are not testimonial. (*Davis*, at p. 822, see also *id*. at pp. 827-828 [165 L.Ed.2d at pp. 237, 240-241] [analyzing the 911 call].)

Here, defendant argues the trial court erred in its determination that the 911 calls were not testimonial. We disagree. Much like the 911 call in *Davis*, K. H. called 911 to report on ongoing emergency (her domestic dispute with defendant), and the information obtained on that call was for the primary purpose of facilitating police assistance to that emergency. (See *Davis v. Washington*, *supra*, 547 U.S. at pp. 822, 827-828 [165 L.Ed.2d at p. 237, 240-241].) Defendant's contention that K. H.'s 911 call was to report past behavior, and not a present emergency, is unsupported by the record. Therefore, the trial court was correct in concluding that the calls were not testimonial and thus did not violate the confrontation clause.

DISPOSITION

The judgment is affirmed.

/s/
Robie, J.

We concur:

/s/
Blease, Acting P. J.

/s/
Duarte, J.